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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 406

ELIE J. BOUDOIN,
Petitioner,

v.

LYKES BROS. STEAMSHIP CO., INC.,
Respondent.

BRIEF ON BEHALF OF THE AMERICAN MERCHANT MARINE INSTITUTE, INC. AS *AMICUS CURIAE*

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STATEMENT OF INTEREST AND SCOPE OF BRIEF

This brief as *amicus curiae* is filed on behalf of the American Merchant Marine Institute, Inc., a non-profit New York membership corporation. The membership of the Institute includes 65 steamship companies which operate dry cargo and passenger vessels, tankers and colliers having a gross tonnage of nearly 6,750,000 tons. This represents about 60% of the privately-owned American-flag merchant marine now active in our foreign and domestic trades.

The members of the Institute have a direct and immediate interest in this case, and are deeply concerned by

the possibility of a decision which would extend further the liability of an operator of an American vessel with respect to the crew, and which could be the basis for additional liability as to a broad class of other workers upon the vessel. *Seas Shipping Company* v. *Sieracki*, 328 U. S. 85 (1946); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953).

This brief is addressed to the issue of whether the operator of a vessel, in the absence of fault, should be held liable for injuries inflicted by an unlicensed seaman upon a fellow unlicensed crew member. Stated otherwise, this issue involves the determination of whether the doctrine of seaworthiness should be extended to impose upon a ship operator an absolute liability for all acts of members of the crew.

It is respectfully submitted that developments within the last few years affecting the economic and social status of seamen and the economic condition of the industry itself make unwarranted any such judicial extension of liability. This case provides the Court with an opportunity to reexamine the premises and policies providing the basis in recent years for decisions that have enlarged the doctrine of seaworthiness and that have extended such doctrine to give extra protection to a broad class of workers other than those actually employed as seamen on American vessels.

Summary of Argument

The decisions of this Court and those of the lower Federal courts within the last generation resulting in the extension of rights to seamen and others who work aboard vessels have been formulated within the traditional power of the Admiralty Court to correct abuses and protect underprivileged seamen as "wards" of the court. Also

prominent in the decisions has been the premise that the imposition of liability, regardless of any other factors, is warranted where insurance would spread the cost.[1]

By the very nature of the judicial process, it is impossible that during this period as each case came up the lower courts or the Supreme Court could have been presented with facts indicating the then currently existing relationship between seamen and their employers, or of the nature and condition of the shipping industry.

This lag between the facts before the appeal court and the existing general conditions, which are rarely at issue in a given case, is worthy of the most serious consideration. Within the space of a few years there has been a startling change in the overall status of seamen. As a matter of fact, many of the advances which have so greatly altered the traditional relationship of the seaman and his employer have actually occurred within the period of this case. American seamen now have achieved such tremendous economic gains as to rank with the most privileged workers in the country. They are able to wield sufficient power as a group to control much of the hiring procedure, and they are able to enforce changes in many practices formerly left to the slower process of legislation or judicial decision. At the same time American shipping is a sick industry, and more and more companies are becoming largely dependent upon government assistance.

In the light of the present position of seamen, the condition of the industry, and the interdependence of government and the industry, this Court should reexamine the policies and premises inherent in recent decisions to determine whether any further judicial extension of liability of a ship operator should be effected by the Court.

(1) *Seas Shipping Company, Inc.* v. *Sieracki*, 328 U. S. 85 (1946); *Keen* v. *Overseas Tankship Corporation*, 194F(2d) 815 (CA 2d, 1952).

ARGUMENT

I

The Current Status of The American Seaman Does Not Require or Justify Judicial Extension of His Rights.

In the past both the courts and the legislature had a reasonable basis to accept the traditional attitude that seamen require special benefits and protection. As a result, there was a steady expansion of the rights and privileges to which seamen were entitled, over and above corresponding rights and privileges for other workers.[2]

These legal doctrines reflecting old ideas of the economic status of the seafarer have little justification in the light of the modern facts of maritime life, and no extension of the rights of seamen should be considered without examination of the recent changes in the relationship of American seamen and their employers.

Generally speaking, the American seaman has made up for all the deficiencies of the past in the few years since the advent of collective bargaining in the industry. Some improvements were instituted prior to 1940, but the most conspicuous advances have actually occurred in the comparatively short space of time since the conclusion of World War II.

Now a seaman is one of the most highly privileged of American workers. His wages rank with the highest; he receives "fringe" benefits which compare with any in the country; and he has other rights and benefits which, in the aggregate, equal or exceed those of other workers.

(2) *Seamen, Seaworthiness, and the Rights of Harbor Workers*, Francis L. Tetreault, 39 Cornell L. Q. 381 (1954).

1. Earnings of American Seamen.

Little more than a generation ago the average seaman on an American vessel was a sub-standard worker who was paid low wages and who was often forced to work under conditions which could not compare to those in other industries.

After 1937, the shipping industry became almost fully unionized, and collective bargaining soon resulted in improved wages and working conditions for seamen. Nevertheless, as late as 1939 the average earnings of an Able Seaman were only $82 per month.[3] Although substantial advances were made during the war years, the most outstanding developments in the economic relationship of seamen and ship operators have occurred since 1946. In this brief span of years and for a variety of reasons, seagoing workers have been able to make advances both in earnings and conditions which go far beyond those won by any other class of American workers. As an example, the Able Seaman now averages about $528.65 per month, without counting other substantial benefits he receives. This represents *more than 600%* of his 1939 pay.

The following chart,[4] providing the current monthly earnings of the crew of a C-2 dry cargo vessel operating out of an Atlantic Coast port, presents a fair picture of

(3) *Industrial Relations in the Ocean Shipping Industry*, Report of Industrial Relations Counselors, Inc. to Maritime Industry Survey Committee (1953). For purposes of wage studies the Able Seaman is customarily considered the "average" seaman.

(4) Based upon study in 1952 by Industrial Relations Counselors, Inc., adjusted for increases in base wages and overtime rates received in 1953 as result of collective bargaining.

the present earnings of a crew on most American-flag vessels:

	Base Wage	Overtime	Total
Master	$1,124.07	$ —	$1,124.07
Chief Mate	737.10	257.58	994.68
2nd Mate	553.91	261.82	815.73
3rd Mate	510.66	256.52	767.18
4th Mate	467.99	283.02	751.01
Radio Officer	501.71	199.28	700.99
Boatswain	400.68	212.00	612.68
Carpenter	375.08	173.84	548.92
Deck Maintenance	343.98	186.16	530.14
A B	314.41	214.24	528.65
O S	244.19	174.42	418.61
Chief Engineer	1,030.84	—	1,030.84
1st Asst. Engineer	737.38	290.44	1,027.82
2nd Asst. Engineer	554.34	265.00	819.34
3rd Asst. Engineer	511.48	216.24	727.72
4th Asst. Engineer	468.62	233.20	701.82
Electrician	499.25	210.94	710.19
2nd Electrician	465.09	171.72	636.81
Oiler	314.41	173.68	488.09
Fireman/Watertender	314.41	184.08	498.49
Wiper	294.30	57.12	351.42
Chief Steward	390.25	224.72	614.97
Chief Cook	361.18	198.22	559.40
Cook/Baker	361.17	198.22	559.39
Third Cook	310.43	193.44	503.87
Messman/Utilityman	242.32	135.66	377.98

A picture of the present earnings of seamen in itself does not provide by any means the full story of the gains made by the seagoing worker in the last fifteen years. A most comprehensive study of the entire situation was completed in 1953.[5] Covering the period through 1952, this study provides not only an analysis of the advances in earnings of seamen in relation to their former wages, but also a comparison of the economic status of seamen

(5) *Industrial Relations in the Ocean Shipping Industry*, supra.

and workers in other industries.[6] Indicative of the findings based upon data in 1945 and 1952, the report states (page 64):

> "* * * As these data indicate, earnings have increased at a faster rate in shipping than in any other branch of enterprise. In percentage terms—as shown more sharply in the accompanying chart—seamen's earnings have gone up nearly twice as much as earnings in manufacturing and building *construction, and more than twice as much as* shipyard and railroad earnings. Even in basic steel and automobile manufacturing—the 'pattern setting' industries of the postwar period—the increases have been considerably smaller than in shipping. Moreover, the current level of seamen's compensation is substantially higher than that of workers in any other industry. For example, while seamen's earnings were slightly below those of steel and automobile workers in 1945, by the Fall of 1952 they were 19 per cent higher than earnings in the steel industry and 21 per cent higher than earnings in automobile manufacturing."

The study also compared the average earnings of unlicensed seamen with those of railroad workers having substantially similar job classifications (page 77):

> "It is evident from this comparison that seamen generally, in all occupations, receive much higher

(6) Table 1, page 60. Comparison of Average Monthly Earnings of Unlicensed Seamen in Dry Cargo Ocean Shipping with Earnings of Production Workers in Manufacturing and with Consumers' Price Index, 1939 and 1952.

Item	1939	1952	1952 as Percentage of 1939
Average monthly earnings			
Unlicensed seamen	$ 82	$465	568%
Production workers in manufacturing	103	307	298
Consumers' price index	99.4	191.5	193

take-home pay than workers doing the same or similar work on railroads, as shown strikingly in the Chart that follows. In ten of the twelve individual comparisons the monthly earnings in the ship ratings exceed those in the corresponding railroad occupations by more than 50 per cent, and in three of the ten—the comparison of ship carpenters with railroad carpenters, that of ship electricians with railroad electrical maintenance workers and that of ship cooks with railroad chefs and cooks—the ship earnings are more than 75 per cent higher than the railroad earnings."

It is important to realize that the wage earnings of seamen which have been shown do not include the very substantial value of subsistence and quarters which seamen receive. These, of course, must be furnished as a necessary part of the business, but as a matter of valuation it may be noted that the various collective bargaining agreements provide that from $8 to $10 per day must be paid to seamen when board and lodging are not provided.

2. Fringe benefits.

As in the case of other industries, the steamship industry now provides very substantial "fringe" benefits. In some respects, these benefits go far beyond the normal for shoreside industries.

(a) Vacations.

As a result of the collective bargaining agreements in 1954, most seafaring workers, from the inexperienced ordinary seaman, wiper or messboy, who have just started working on ships, to the First Mate, will receive the equivalent of a *four-week* vacation for a year's work for one company, and Masters of vessels may receive from six to eight weeks' vacation. The institution since 1950 of

industry-wide vacation plans, administered jointly by employers and employees, has also provided a means of granting vacation credit for the short-term worker who is able to earn vacation credits even though his employment during the year is for more than one company.[7]

(b) Pension and Welfare Benefits.

The pension and welfare benefits now general throughout the shipping industry compare most favorably to similar benefits accorded in other industries and far exceed those in any industry having similar or comparable economic conditions.

Beginning in 1950, labor-management administered trusts have been established pursuant to collective bargaining for each of the various union groups. Under most of these trusts, which are financed solely by employer contributions, the welfare benefits have been very similar. In the case of the NMU Pension and Welfare Plan, covering a majority of the unlicensed seamen, the Plan provides to eligible seamen life insurance of $3,500, accidental death and dismemberment insurance of $3,500, and a weekly payment of $21 to any hospitalized seaman, even though he is receiving free treatment in a marine hospital. In addition to these benefits, the dependents of eligible seamen are entitled to liberal insured payments for hospital and surgical expenses.[8]

(7) The majority of the vacation plans provide that a seaman receives vacation credit for employment divided between any number of covered employers. Generally, he becomes entitled to receive a proportionate amount of a two-weeks' vacation.

(8) Dependency coverage for the NMU Plan, which is less elaborate than that in some other Plans, consists of a daily hospital benefit of $8, extra hospital services payment up to $80, a maternity benefit of up to $200, and payment for surgical expenses up to $150.

In an industry which, as we will see, has always been so speculative as to be unattractive generally to investors, the Pension Plans now in effect for unlicensed seamen are sufficient testimony to the new economic status of seamen. Within the last year the NMU Pension Plan on the Atlantic and Gulf Coasts was put into effect providing a basic pension of $55 (excluding Social Security) for unlicensed seamen after 20 years' service. At about the same time the Pacific Maritime Association established a basic pension of $100 per month for similar workers on the West Coast who had foregone certain wage increases given to those on the Atlantic and Gulf Coasts. Pension plans for licensed seamen, many of whom are beneficiaries of established company plans, are now under discussion.

3. Working Conditions.

The changes in earnings of seamen have been matched by changes in working conditions, and, obviously, no argument can be made that the old conditions, perhaps symbolic of the traditional low status of a seafarer, should not have been improved. The very nature of shipping requires limitations and hardships which are alien to most shoreside industries, but the Court may take notice, nevertheless, of the advances which seamen have made.

As a result of collective bargaining agreements as to scope of work (resulting in penalty payments when compliance is impossible or impracticable), the requirements of manning and required service by a seaman have been altered radically. No adequate analysis of this change has been made, but the increase in overtime or penalty payments to seamen, amounting to about 50% of base wages, represents a part of the consideration for meeting the necessary obligations thus imposed. As air conditioning has been used on new passenger vessels, its use has been

extended for the crew. On new dry cargo vessels and tankers the crew is also being provided with air conditioning, and, wherever possible, with enlarged and individualized quarters. Reports of the current construction of large new tankers state that they will include swimming pools for crew members.

Possibly the change in the status of seamen can be demonstrated more effectively by reference to more commonplace, every-day items. The NMU contract, as an example, requires a weekly change of bed linen. Towels must be changed twice weekly, with soap of the highest quality being furnished with each change. The furnishing of innerspring mattresses for all seamen is becoming more and more standard in the industry and consideration has been given to providing built-in bunks for everyone. It may be noted that one of the questions in the 1954 collective bargaining was the matter of *how many* automatic washing machines should be furnished for use of the crew.

4. Changes in conditions controlled by the Courts or Legislature.

The new status of the American seaman, able to exercise the power of collective bargaining, is shown not only in the tremendous increase in earnings at a time when the industry itself was not advancing economically, but also in the exercise of control over conditions which have traditionally been handled by the Admiralty Courts or by the Legislature.

It is unnecessary here to present to the Court any discussion of the development or extent of the doctrine of "maintenance and cure" under which seamen have received from the courts the right to recover for disability incurred during employment on a vessel. In recent years the Admiralty Courts have established the amount of

"maintenance and cure" at $6 per day. As an example of the new approach to such matters, and indicative of the ability of the seaman to require a more immediate approach to what he considers is needed under existing living conditions, the unions in 1953 in their collective bargaining agreements forced an increase in the payment to $8 per day.

In 1954 the CIO unions on the Atlantic and Gulf Coasts also negotiated new provisions to make more practicable the payment of maintenance and benefits when a seaman is in a foreign country, and more strictly defined the statutory provisions for pay-off on discharge.

5. Hiring Practices.

It is impossible to consider a question, as in the instant case, involving the liability of the steamship operator for the acts of his employees without consideration of the existing hiring procedures. The industry has advanced a long way since the days of chaotic hiring off the docks. As a result of collective bargaining, the union hiring hall has now become the normal method of employment.(9) Except for a very few exempt classifications in the categories closest to management, the hiring of seafarers is based on the rotary system which is designed to spread employment among a larger employable group than the jobs available. Subject only to the limitations of the Taft-Hartley Law, the maritime unions substantially control the men who are sent to secure jobs from the shipping companies. Under existing practice, it may be said that a shipping company, unless it is in a position to furnish reasonable objections to an applicant sent to it for em-

(9) *Ocean Transportation*, Carl E. McDowell and Helen M. Gibbs (New York, 1954) at page 211; Hiring Provisions and Practices, page 195, *Industrial Relations in the Ocean Shipping Industry*, *supra*.

ployment, must accept such applicant. This condition is obviously much more stringent in the case of entry ratings, such as ordinary seaman and wiper, or, in the case of passenger vessels, where the applicants for places in the Steward's Department usually have had no experience in shipping. Under these condition , it is obvious that in most instances under the current hiring practices the steamship company is in no position to have any knowledge of the "disposition" of its employee. The "disposition" of such an employee is more likely to be known by the fellow crew members who form a part of his own union.

A main disadvantage of the hiring hall system of employment from the standpoint of efficient ship management has been characterized as follows:[10]

> "* * * In the first place, it gives management little discretion in choosing its personnel. It is true that the employers have the right to reject unsuitable men referred to them, but that right is hardly a satisfactory substitute for the right to select men in the first instance. Moreover, the rotational dispatching feature tends to perpetuate below par seamen in the industry. If one company rejects a particular man on grounds of incompetence, his name is again placed on the list in the hiring hall, and in due course he is dispatched to another company."

In this case, the Court is presented with the curious problem of whether a ship operator should be held liable to members of the crew for the disposition and acts of an employee who was employed under conditions which are subject to the control of the very persons who might appear as plaintiffs. If the doctrine of seaworthiness

(10) *Industrial Relations in the Ocean Shipping Industry, supra*, page 198.

is carried out under the principle of the *Haven* case,[11] the end result would be even more extreme. Then a ship operator could be held liable to a longshoreman or other harbor worker for the "disposition" of the employee of another employer, who may have been selected, not by his own employer, but by the union or a government agency.

II

Current Economic Status of American Shipping Companies.

At a time when most of American industry is looking forward to a period of considerable prosperity, shipping companies currently hope merely that the slight upturn in world trade, aided by the beneficial effect of new legislation such as the law requiring participation of American ships in at least 50% of government-aid cargoes,[12] will create a slight improvement in conditions, enabling many to change from red to black and others to require less subsidy from the government in order to maintain a profitable operation.

American merchant marine shipping reached a low mark in 1954. By December 1, 1954 the privately-owned merchant marine fleet had dropped to 1,162 vessels, a shrinkage in one month of 17 vessels.[13] There has also been a substantial reduction in active tonnage from the lay-up of many ships, unable to find cargoes which would provide sufficient earnings to justify operation. As a matter of fact, in recognition of conditions which made it cheaper for many shipping companies to put their vessels in "moth balls" rather than operate at a loss, the Maritime

(11) *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953).

(12) The so-called "50/50 Law," Public Law 664, 83rd Cong., 2d Sess.

(13) Research Report No. 54-17, American Merchant Marine Institute, Inc., December 13, 1954.

Administration in 1954 permitted the transfer to foreign registry of more than 75 vessels. Other factors gave a further indication of the low state of American shipping. At least one subsidized operator had given up its subsidy contracts and turned to foreign-flag operation; a strong independent operator indicated that it must have government assistance in order to continue; and one of the old names in intercoastal shipping announced its withdrawal from the trade. There was further evidence that tramp shipping, an important segment of the industry, could not exist without direct or indirect government assistance.[14]

There has been general acceptance of the conclusion that except where shipping is part of an industrial operation, it is constantly faced with financial problems. In "The Problem of Shipping Finance",[15] it is pointed out in summary that American shipping capital is handicapped by a very large investment in vessels which is necessarily committed over an extended period of years, by an unsatisfactory earning record, and by a very small public investment participation. It is further pointed out that other stumbling blocks are created by a lack of industry unity and policy, by a vague and inconsistent government policy, and by a most serious problem of block obsolescence. The unattractiveness of shipping securities has been described as follows:[16]

> "Shipping securities are not too popular with the public. This is evidenced by the fact that during the last five years, taking Dow Jones selections, rail securities advanced by some 23 percent and indus-

(14) *Tramp Shipping and the American Merchant Marine*, report of the American Tramp Shipowners Association, Inc., February, 1954.

(15) *Ocean Transportation*, *supra*, chapter 14, page 274.

(16) *Ocean Transportation*, *supra*, page 275, report of address by James A. Farrell, Jr., February 28, 1952.

trials about 25 percent, while shipping securities actually declined. Because shipping earnings during this same period have been very good, the foregoing may sound paradoxical. Not to the investing public. They understand that shipping enterprises make good profits at times, but earnings fluctuate wildly over a long period, and worn out ships make poor dividends. The public is interested in steady income, even at lower rates. It is difficult, if not impossible to forecast a large rebuilding program primarily through the sale of new bonds, debentures or equity shares."

Although there is no unanimity as to what should be done, there is no disagreement as to the major reason why American shipping cannot operate profitably in other than war or "emergency" years without government assistance. The operator of an American-flag vessel is at a tremendous cost disadvantage compared with the foreign operator.

The individual gains in earnings by seamen have already been described. The overall picture must also be considered, as set forth in the following "Trend in Monthly Wage Costs for a Typical United States-Flag C-2 Type Vessel:"[17]

	1937		1952		Per cent
	Dollars	Per cent	Dollars	Per cent	Increase
Base wages	$4,543	91.0	$15,736	65.2	246
Overtime	432	8.6	6,264	25.9	1,350
Fringe items ...	20	0.4	2,152	8.9	10,660
	$4,995	100.0	$24,152	100.0	384

(17) *Maritime Subsidy Policy*, April 1954, a Review of Maritime Subsidy Policy in the light of present national requirement for a Merchant Marine and a Ship Building Industry. Report prepared by the Office of the Under Secretary of Commerce for Transportation and the Maritime Administration, page 52.

The comprehensive study of "Maritime Subsidy Policy" issued by the Department of Commerce in 1954 points out that since the end of World War II, the actual number of competitive foreign flags encountered by the American operators had increased to the point where in 1951 there were approximately 27 substantially competitive foreign-flags. Among these the competition offered by the fleets of Japan and Germany were even then assuming their pre-war importance. The following table[18] provides typical examples of the wage differences between United States-flag vessels and foreign-flag vessels in competition on certain trade routes:

"Representative Monthly Wage Costs by Flag of Operator on Typical Trade Routes

Flag of Registry	Nominal Trade Route Designation				
	A	B	C	D	E
United States	$23,000	$25,000	$20,000	$20,000	$18,000
Danish	6,400	—	—	—	—
Chilean	9,400	—	—	—	—
Norwegian	—	5,500	5,200	—	5,300
Belgian	—	—	8,300	—	—
United Kingdom	—	—	4,700	—	5,000
Greek	—	—	—	6,300	—
Italian	—	—	—	6,500	—
Spanish	—	—	—	5,300	—
Netherlands	—	—	—	—	7,600
Union of South Africa	—	—	—	—	6,000"

It is also pointed out in "Maritime Subsidy Policy" that, after taking into consideration all factors concerned

(18) *Maritime Subsidy Policy, supra*, page 54. The report adds: "Japanese wage costs, despite their relatively high manning requirements, are the lowest encountered by United States-flag vessels. In 1951 ships of United States-flag registry operating in competition with Japanese ships paid wages which averaged $21,700 per month in contrast to Japanese payments of $2,900 per month."

with total labor costs, as compared with direct wage costs, the averages of composite weighted differentials between United States and foreign costs in 1951 were approximately 71%.

The plight of domestic shipping, represented by the coastal and intercoastal lines, is even more drastic in spite of the fact that it is not faced with foreign competition. Domestic shipping has had to absorb all the increases in costs of ship operation and has not been able to maintain a profitable rate structure in competition with other forms of transportation.

III

The Government and the Merchant Marine.

In 1936 Congress established a policy that the United States should have and should aid a privately operated merchant marine.[19] The method of carrying out this policy has been criticized, but there has never been any serious opposition to the policy itself.[20] Instead, it has become more and more apparent that there is a steadily increasing need for more and more governmental interven-

(19) Merchant Marine Act, 1936, 46 U.S.C. 1101.

(20) *Survey, The American Merchant Marine Policies and Problems*, a report of the House Committee on Merchant Marine and Fisheries, 83rd Cong., 2d Sess. 1954; *Maritime Subsidy Policy, supra; American Merchant Marine and the Federal Tax Policy*, Report to the President on Governmental Assistance Necessary to Maintain a Merchant Marine Adequate to the Commercial and National Defense Requirements of the United States, submitted by the Secretary of Commerce, 1952; *Analysis of Construction and Operating Subsidies under the Merchant Marine Act, 1936, as amended*, with minority report, submitted by The Ocean Shipping Panel to The Transportation Council for the Department of Commerce (1953); Budget Message to Congress of the President, January 17, 1955.

tion in the shipping situation. Both Congress and the Executive Department are aware of the difficulties and there is a constant process of review.[21]

It is obvious, therefore, that the interplay of the needs of the industry and the ability and desire of the government to satisfy such needs necessarily requires consideration of the entire relationship of employer-employee-government. No one factor can be treated without determining its overall effect. For example, during the last year the Administration, in an ill-conceived economy move, considered the advisability of acting under executive order and legislation to terminate the traditional marine hospitalization accorded seamen. Such action would have had industry-wide repercussions, and would have required a complete review of the rights of seamen, the liability of employers and the proper shift of the cost of hospitalization and treatment.

Similarly, any development of government assistance under the Merchant Marine Act, 1936, or otherwise, must take into account the cost of the responsibility for personal injuries to employees imposed upon the ship oper-

(21) The Chairman of the Committee on the Merchant Marine and Fisheries has recently announced an exhaustive study of labor and other operational costs, and of the present need for government aid to shipping; in his Budget Message to Congress, January 17, 1955, President Eisenhower stated:

"Payment of subsidies to American ship operators to offset lower operating costs of foreign ships will require appropriations estimated at 115 million dollars in 1956. The rapid rise recently in expenditures for this purpose and the possibility of continued increases make it important to provide more effective budgetary control over the level of subsidized operations. I am, therefore, proposing in this budget to establish a limitation on new long-term contracts to pay operating-differential subsidies. Such a limitation will permit annual review by the President and the Congress of the extent of our future subsidy commitments."

ator. Although the Maritime Administration has not yet established a subsidy differential for the cost of protection and indemnity insurance, it is expected that American costs on the average will be approximately 50% heavier than foreign costs.

Of course it is not argued that a decision in the instant case will so profoundly affect costs as to become, in itself, a vital factor in ship operation or in the relationship between the employer and the government. Nevertheless, it is impossible to divorce one decision of this Court from hundreds of others which will follow here and in the lower courts. The continuous extension of liability for personal injuries and the concurrent increase in the cost of P&I insurance could loom large enough to be a factor in determining whether or not operation under a foreign flag is desirable.

Accordingly, the Supreme Court must take into consideration the overall effect of its rulings. In the past this Court has indicated a strong preference for a workmen's compensation system which would replace the judicially imposed "insured liability", but, in broadening the liability of the ship operator, the Court has effectively prevented legislative action. The review of "Workmen's Compensation Versus Employers' Liability"[22] concludes by saying:

> "Despite these findings and the historical trend toward workmen's compensation, no such system has been made applicable to seamen to date, and perhaps none will ever be. The reason is obvious: the employees themselves do not want it. This situation, the opposite of that in nearly every other industry, points up the fact that seamen, once so badly treated and so lacking in legal remedies to

(22) *Ocean Transportation, supra*, Chapter 16, page 324.

> protect them, now enjoy a position just the reverse of that of a few years ago. Instead of having remedies generally inferior to those of other industrial workers, seamen now have remedies so superior to those applicable to their fellow workers that they resist any effort to reduce their status to the common level. Since the days before World I, the merchant seaman has come a long way."

A substantially similar conclusion appears in "Seamen, Seaworthiness, and the Rights of Harbor Workers"[23] where, in discussing the merits of judicial creation of a favored group of workers, it was said:

> "* * * Disregarding the question which history raises concerning the suitability of the judicial process for performance of the legislative function, the substantially important question remains whether the Supreme Court regards its quasi legislative determinations in the maritime field as within the doctrine of *stare decisis* or whether they are, like true legislative determinations, subject to continuing review, modification, reopening, amendment and repeal."

It is clear that the issue of the extension of liability of ship operators cannot be treated in a vacuum without consideration of many other related factors. The Court may wish to conclude as it has in the past that:

> "The legislative process is peculiarly adapted to determine which of the many solutions to this problem would be most beneficial in the long run." *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U. S. 282, 286 (1952).

(23) 39 Cornell L. Q. 381, 402 (1954).

Conclusion

The American seaman is no longer the underprivileged worker of the past whose only recourse in many instances was to the Admiralty Courts. Instead we now find the seaman to be one of the most highly favored workers in America, receiving compensation and other benefits equal to or better than those in other industries.

The seaman, through collective bargaining, has been able to wield his newly developed economic power in such a way as drastically to affect shipping operations and costs, and even to control many of the practices involved in his employment which were formerly left to the courts or legislature.

At the same time, all the factors creating a high cost of operation have placed the shipping industry itself in such condition that continued existence under the American flag for a most important segment of the industry depends upon some form of government assistance.

In this situation, the determination of the advisability of extending a further benefit to seamen or of broadening the responsibility of a ship operator cannot be divorced from other important considerations. The fixing of the legitimate costs of operation, including the extent of the protection needed by and which should be furnished the employees and the share the government must bear, is a legislative function which should be accomplished only upon full consideration of all current facts and the necessary interplay of governmental policies. The decision should not be made in the judicial forum.

In the context of the foregoing economic picture, it is submitted that wisdom dictates that the philosophy inherent in the decision of the Court of Appeals should be accepted. The facts here are peculiarly appropriate for application of the often neglected doctrine of judicial self-limitation.

It is respectfully submitted, therefore, that the decision of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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Certificate

I, JOHN J. BURNS, Counsel for the American Merchant Marine Institute, Inc., *amicus curiae*, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24th day of January, 1955 I served copies of the foregoing Brief on counsel for all parties of record by mailing copies to their offices in duly addressed envelopes with air mail postage prepaid

JOHN J. BURNS